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No.

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SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHN KELLY - **Petitioner**

versus

COMMONWEALTH OF KENTUCKY - - - - - - - - **Respondent**

On Petition for a Writ of Certiorari
to the Kentucky Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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September 21, 1994

QUESTIONS PRESENTED

1. Was the petitioner denied due process of law when he was convicted of complicity to commit theft by deception where there was insufficient evidence to support a finding of guilt beyond a reasonable doubt?

2. Was the petitioner denied due process of law and equal protection under the law when the Kentucky Supreme Court encroached on executive discretion in violation of the Constitutional doctrine of separation of powers?

3. Was the petitioner denied due process of law and equal protection under the law when Justice Stumbo failed to disqualify herself from participation in the majority opinion against petitioner?

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JOHN KELLY ----------**Petitioner**

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PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

Petitioner respectfully petitions for a Writ of Certiorari issue to review the opinion of the Kentucky Supreme Court decided and filed on February 24, 1994.

OPINION BELOW

The opinion of the Kentucky Supreme Court decided and filed on February 24, 1994 (Appendix A) is reported at 875 S.W.2d 865. A petition for rehearing was filed (Appendix C). The order of the Kentucky Supreme Court denying the petition for rehearing was entered on June 23, 1994 (Appendix B).

JURISDICTION

The opinion of the Court of Appeals (Appendix A) was decided and filed on February 24, 1994; and a timely petition for

rehearing (Appendix C) was denied by order of the Court (Appendix B) on June 23, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a) and Supreme Court Rule 10.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be...deprived of life, liberty, or property, without due process of life.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, Section 1, of the United States Constitution provides in pertinent part as follows:

> All legislative powers being granted shall be rested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article II, Section 1, of the United States Constitution provides in pertinent part as follows:

> The executive power shall be vested in a President of the United States of America.

Article III, Section 1, of the United States Constitution provides in pertinent part as follows:

> The judicial power of the United States shall be vested in one superior court, and such inferior courts as the

Congress may, from time to time, ordain and establish.

Section 27 of the Kentucky Constitution provides:

> The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Section 28 of the Kentucky Constitution provides:

> No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others....

Kentucky Revised Statute 42.012 provides in pertinent part as follows:

> The Secretary of the Finance and Administration Cabinet shall be the chief financial officer of the State and the adviser of the Governor and the General Assembly in financial matters....

Title 200, Chapter 2, of the Kentucky Administrative Regulations provides in pertinent part as follows:

> The Finance and Administration Cabinet is directed by law to coordinate and supervise the fiscal affairs and procedures of the state and is authorized to adopt regulations for that purpose. The purpose of this regulation is to specify eligibility, requirements, rates, and forms for reimbursement of travel expense and other official expenses out of the State Treasury.
>
> Section 1.(5) "Secretary" means the Secretary of the Finance and Administration Cabinet.
>
> (7) "Others in the official service of the

Commonwealth" means persons who are not state employees as defined in KRS Chapter 18A, but who are traveling on official business for the Commonwealth, or who officially represent a state agency, at the direction or request of a state official authorized to give the direction or make the request.

Section 2.(4) Interpretation. All final interpretations of this regulation shall be made by the secretary. These determinations shall be final and conclusive.

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial in the Franklin Circuit Court of "complicity to [commit] theft by deception when with the intention of promoting or facilitating the commission of the offense of theft by deception he aided Ward Burnette and J.D. Wolf in committing the offense of theft by deception...when as an employee of the Finance and Administration Cabinet of the Commonwealth of Kentucky he received, in the course of his employment, invoices from Wilkinson Flying Service...and directed Wilkinson Flying Service personnel to resubmit the bill on an invoice from a different company and directed said personnel to include on said invoice information which he knew was inaccurate." Burnette and Wolf were convicted of theft by deception.

The charges against Burnette, Wolf, and petitioner Kelly arose from a series of events which took place in late 1987 and early 1988. Burnette was elected Commissioner of Agriculture for the Commonwealth of Kentucky in November, 1987, but did not officially take office until January 4, 1988. J.D. Wolf, although still being paid by the Commonwealth, was on an extended leave of

absence from the Department of Agriculture during the transition period between changes in government administrations.

In mid-December, 1987, as Agriculture Commissioner-elect, but before Burnette had actually taken office, Burnette and Wolf and Bruce Harper took chartered plane trips on consecutive days--December 14th and 15th--to Chicago and Washington, D.C. The purpose of these plane trips was to pursue information about and promote a specific agriculture program for Kentucky farmers. The chartered flights were arranged by Harper through a flying service owned by Wallace Wilkinson, the newly-elected Governor of Kentucky. Bruce Harper participated in the trips because Wilkinson had initially proposed to appoint Harper to a position in the Governor's Office as his agriculture liaison with Commissioner of Agriculture Burnette. Harper was charged with conspiracy to theft by deception but was acquitted at trial.

In January, 1988, Angela Hicks, an employee of Wilkinson Flying Service, prepared an invoice for both flights using the Wilkinson Flying Service letterhead. The submittal of the invoices on Wilkinson Flying Service letterhead immediately precipitated a controversy as to whether the invoices could be paid. Prior to Wallace Wilkinson becoming Governor in December, 1987, Wilkinson had sought an Attorney General's opinion as to whether there would be a conflict of interest if his administrator did business with any of his many business interests which included the Flying Service. The Attorney General's opinion stated that there would be such a conflict of interest and that the state should avoid doing business with any of the various Wilkinson companies. The invoices were dated January 4th and January 5th, 1988, and mailed to the Department of Agriculture. Ultimately, the bill came to Wolf, who with Burnette, presented it for payment to Rogers Wells,

Secretary of Finance and Administration. Wells then referred the bill to an assistant, petitioner John Kelly, for investigation to determine if it should be paid. At the time, Kelly was only 25 years of age and had been working in state government for only a few weeks.

Petitioner Kelly contacted Hicks at Wilkinson Flying Service and was informed that the planes were actually owned by Central Rock Company, rather than Wilkinson Flying Service. He then requested that Centra Rock submit the bill for payment. The invoices that were initially reviewed by Kelly already contained incorrect dates of January 4th and 5h, 1988, for the flights in question. Hicks testified that she had listed the incorrect dates for the flights at the direction of Bruce Harper, so that the dates would erroneously indicate that the flights had occurred after Burnette took office on January 1, 1988. Hicks further testified that she had informed Kelly of the incorrect dates and said that Kelly told her to change the flight dates a second time, to the final incorrect dates of January 14th and 20th, 1988. However, neither Hicks nor anyone else gave any reason as to why Kelly would have directed her to alter the dates a second time. Her testimony about Kelly's role in the alteration of the dates was the only such testimony incriminating Kelly, who denied having told her to do this. Furthermore, no evidence was introduced at trial to show that Kelly ever discussed this matter with any of the other defendants.

The new invoices were sent to petitioner Kelly, who, in accordance with normal procedure, sent them to Military Affairs to determine if payment was appropriate. Upon receipt of the invoices, Hank Lindsey, Director of Air Transport for Military Affairs, noticed that the Department of Agriculture had failed to submit the proper forms. After unsuccessful efforts to obtain the correct forms,

Lindsey turned the bills over to Adjutant General Michael Davidson. There was some discussion between Davidson and Burnette concerning the missing forms; however, following Burnette's assurances that the forms would be sent, the bills were approved for payment and a check in the amount of $5,439.75 was issued to Central Rock. It is important to note that petitioner Kelly was not involved in the final payment approval process.

An inter-account bill was sent to the Department of Agriculture and was approved by Wolf. During an annual audit, the dates on the invoices caused further inquiry by the auditor in that, according to Burnette's calendar, Burnette was in Hopkinsville on January 14th, and in Atlanta, Georgia on January 20th, 1988. Eventually, criminal charges were filed against Burnette and Wolf for allegedly obtaining airplane travel of a value in excess of $100 by deception with intent to deprive the Commonwealth by making two unauthorized flights. The indictment charged that a false impression as to Burnette's and Wolf's authority to take the flights was created by the false flight dates on the invoices. Petitioner Kelly was charged with complicity for directing that the original invoices from Wilkinson Flying Service be changed to Central Rock.

Following his conviction at trial, petitioner Kelly appealed to the Kentucky Court of Appeals. In a unanimous decision of the Court of Appeals panel, Kelly's conviction was reversed, and the trial court was ordered to enter Judgment of Acquittal for Kelly. The Court of Appeals found there was insufficient evidence to support a finding of guilt. This decision was decided February 7, 1992. A new Attorney General had just taken office, and he made the decision to seek to have the Kentucky Supreme Court review the decision of the Court of Appeals by filing a Petition for Discretionary Review.

The Supreme Court of Kentucky voted to grant discretionary review. Briefs were submitted and oral arguments were made before the Supreme Court on January 10, 1993. One of the Justices on the Court at that time, Justice Dan Jack Combs, resigned effective June 30, 1993. Governor Brereton Jones appointed Sarah Combs as the Associate Justice to serve until the November 1993 General Election. Justice Sarah Combs was opposed in the November election by Court of Appeals Judge Janet Stumbo, who was on the Court of Appeals at the time that court voted to reverse Kelly's conviction, although not a member of the three judge panel that heard the case.

On November 2, 1993, Justice Stumbo was elected to complete the unexpired term of Justice Dan Jack Combs. On February 24, 1994, with Justice Stumbo voting in the majority, the Kentucky Supreme Court rendered its 4-3 Opinion reversing the prior decision of the Kentucky Court of Appeals. The February 24, 1994, Opinion of the Kentucky Supreme Court does not indicate whether Justice Sarah Combs participated in any manner in the decision of this case, although she was an Associate Justice of the court for some four months during the period of time the case was under submission.

In a Petition for Rehearing filed before the Kentucky Supreme Court, Kelly argued that Justice Stumbo should have been disqualified from sitting as a Justice in the opinion of this case because she was on the Court of Appeals at the time his conviction was reversed by that court. In addition, it was argued by petitioner Kelly that Justice Stumbo should have been disqualified because of her connection to petitioner Kelly. In May, 1992, and after the unanimous decision of the Court of Appeals to reverse Kelly's conviction, then Court of Appeals Judge Stumbo's husband, Ned

Pillersdorf, was a candidate in the Democratic Primary for Congress. Another candidate for that nomination was Bobby Rowe, from Pillersdorf's home county of Floyd County. Petitioner Kelly was a personal friend of Rowe's and became very actively and visibly involved in Rowe's campaign, being seen on several occasions in the company of Rowe by Justice Stumbo and her husband Pillersdorf. [Appendix C, Affidavit of Dale Emmons, attached to Petition for Rehearing.]

This election was won by John Doug Hays from Pike County. Some time after the election, Pillersdorf expressed his belief that Rowe's presence in the race had cost Pillersdorf the election by splitting the votes in Floyd County. Petitioner Kelly argued his involvement in this campaign against Justice Stumbo's husband was a factor in her vote to reverse a unanimous decision of the Kentucky Court of Appeals.

Kelly's Petition for Rehearing alleged that his United States Constitutional guarantees of due process of law and equal protection had been violated when the court infringed upon the constitutional doctrine of separation of powers by substituting its judgment for that of executive discretion. Petitioner Kelly also argued in his Petition for Rehearing that his United States Constitutional guarantees of due process and equal protection had been violated by Justice Stumbo's participation in the Kentucky Supreme Court opinion, arguing she should have been disqualified. The Kentucky Supreme Court voted not to grant a rehearing in the case.

The federal constitutional questions involved in this case were first raised by petitioner Kelly during his direct appeal where he argued his constitutional guarantee of due process of law was violated when there was insufficient evidence to prove his guilt

beyond a reasonable doubt. The Court of Appeals of Kentucky reversed his conviction on this ground; however, the Supreme Court of Kentucky reversed the decision of the Kentucky Court of Appeals. It was not until the decision of the Kentucky Supreme Court that petitioner Kelly's additional due process and equal protection claims were first realized--the issues concerning the separation of powers document and judicial disqualification. Petitioner Kelly then raised his federal constitutional guarantees of due process of law and equal protection in a Petition for Rehearing, which the Kentucky Supreme Court denied. [See Appendix A, Opinion of the Kentucky Supreme Court; Appendix B, Order Denying Rehearing; and Appendix C, Petition for Rehearing.]

REASONS FOR GRANTING THE WRIT

1. The Petitioner Was Denied Due Process of Law When He Was Convicted of Complicity to Theft by Deception Where There Was Insufficient Evidence to Support a Finding of Guilt Beyond a Reasonable Doubt.

This Court held in Jackson v. Virginia, 443 U.S. 307 (1979), that the standard for review of insufficient evidence is:

> whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id., at 319.

In the present case, it is respectfully urged that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt," id., at 324, so that review should be granted to reverse petitioner's conviction.

The proof in this case as to petitioner Kelly demonstrates that Kelly was an assistant to the Finance and Administration Secretary Rogers Wells. Petitioner Kelly contacted Wilkinson Flying Service after receiving the invoices from Wells. He was told that Central Rock owned the planes, and he requested that Central Rock then submit the bill for payment. Further, in the light most favorable to the government, Kelly told the employee at Wilkinson Flying Service to change the flight dates from January 4th and 5th to January 14th and 20th. However, it was undisputed that the invoices initially submitted to Kelly already contained incorrect dates at the time of their submission to him. The invoice was resubmitted on Central Rock letterhead and eventually paid.

The Commonwealth's case was premised on the theory that Burnette, Wolf, and Kelly intentionally deceived the Commonwealth by submitting invoices containing false flight dates. The actual flight dates of December 14th and 15th, 1987, were before Burnette took office as Commissioner of Agriculture. The Commonwealth did not prove at trial that the flights were not for the stated purpose of furthering the agricultural interest of Kentucky and for the benefit of Kentucky. The false flight dates were the only misrepresentation alleged or proved at trial.

At trial, Rogers Wells, Secretary of Finance and Administration, testified the dates on the invoices were not the determining factor in approving them for payment. Wells testified he was the person statutorily charged with the decision as to whether the travel expenses are to be paid by the Commonwealth. KRS 42.012. Under 200 KAR 2:006, Sec. 2(4), the Secretary's interpretation of the travel expense and reimbursement regulations is final. That section reads as follows:

All final interpretations of this regulation shall be made by

the secretary. These determinations shall be final and conclusive.

Wells testified:

Q. If those facts had been presented to you that the trip had been in December and all these other facts that I've mentioned and those facts had been presented to you, would you have authorized the payment of that bill, assuming that it was up to you to do that?

A. Yes, sir.

Q. And under the regulations, you have the right to declare whether or not there should be a reimbursement for travel expenses based upon all these conditions that we've spoken about, have you not, sir?

A. Yes, sir.

Q. And would you, sir, certify that the travel expenses should have been reimbursed under those circumstances that I have described to you?

A. Yes, sir.

Q. All right. When I say "reimbursed," I mean paid to the person that has the money coming; is that correct, sir?

A. With proper documentation, the invoice would have been paid, yes, sir.

Q. All right. And if that trip had been taken without getting a prior approval from military affairs, it could still be paid for, even though that didn't take place and they get subsequent approval; isn't that correct, sir?

A. That is correct, sir.

Q. And that would be your official interpretation of the state's right to pay this bill; is that correct, sir?

THE WITNESS: That would be my official interpretation?

MR. HADDAD: Yes, sir.

A. As secretary of the finance cabinet--

MR. HADDAD: Yes.

A. --I would have approved the bill had I known the facts as I understand them from the testimony.

Q. Even though the trip was in December?

A. That wouldn't have had any bearing on it.

In order to sustain a conviction for complicity to theft by deception of the petitioner Kelly, the Commonwealth is under the burden of proving every element of the offense beyond a reasonable doubt. The law in the Commonwealth of Kentucky is that the victim must act in reliance upon the accused's false impression, and reliance is an essential element of the offense which must be proved beyond a reasonable doubt. Brown v. Commonwealth, Ky., 656 S.W.2d 727 (1983). If one relies on the deception perpetrated by the accused, a theft by deception has occurred; on the other hand, if one is not induced to act by reason of the deception, but is motivated by some other factor, then there is no theft by deception.

Wells specifically testified the erroneous flight dates would have had no bearing on his determination to approve payment of the invoices. Because the Commonwealth did not prove the flights were for anything other than a public purpose, whether the flights occurred in December or January was of no consequence. Therefore, no rational trier of fact could have found that the flight dates, even though purportedly falsified with the intent to deceive, were relied upon by the Commonwealth in rendering payment. Therefore, no theft by deception occurred and petitioner Kelly's conviction for complicity to theft by deception is not supported by the evidence.

It is respectfully submitted that petitioner Kelly was denied due

process of law when he was convicted of complicity to theft by deception where the evidence was insufficient to prove these offenses beyond a reasonable doubt.

2. The Petitioner Was Denied Due Process of Law and Equal Protection of the Law When the Judicial Branch of Government Encroached on the Exercise of Executive Discretion in Violation of the Doctrine of Separation of Powers Established by the Kentucky Constitution.

The United States Constitution provides for the separation of powers in federal government. Likewise, the Kentucky Constitution provides for a separation of powers in state government. Section 27 of the Kentucky Constitution provides:

> The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

The Kentucky Constitution, Section 28, also provides:

> No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others....

This Court has held, in I.N.S. v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), the separation of powers doctrine was:

> intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those

checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. Id., 462 U.S. at 957-58, 103 S.Ct. at 2787.

In the present case, the Kentucky Supreme Court has substituted its judgment in administrative matters in lieu of the determinations made by members of the Executive Branch, in particular, Finance Secretary Rogers Wells. Secretary Wells was designated by statute and regulation to administer and interpret the travel regulations at issue in this case.

In late January, 1988 Burnette and Wolf took the airline flight invoice to Secretary Wells to seek his guidance and approval in getting the unpaid invoice processed by the state. Secretary Wells testified the erroneous information he was provided back in early 1988, the dates of the flights, was not factually relevant to him in approving the payment of the invoice. Even when Secretary Wells was presented with the true state of facts at trial, he testified that as Finance Secretary, he would have authorized payment of the invoice because it was appropriate for the state to pay the invoice.

The opinion of the Kentucky Supreme Court represents an encroachment into areas of administration granted to the Executive Branch by the Kentucky Constitution and statutes. Under principles of law established and consistently reaffirmed, the Majority Opinion represents a deviation from the separation of powers doctrine. Furthermore, this encroachment represents a denial of petitioner Kelly's due process and equal protection rights under the United States Constitution.

This Court has consistently stated, each branch of government has "certain defined functions delegated to it by the Constitution." And, "in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt

congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches." Tennessee Valley Authority v. Hill, 437 U.S. 153, 194-95, 98 S.Ct. 2279, 2301-02, 57 L.Ed.2d 117 (1978).

The Kentucky Supreme Court has noted the separation of powers doctrine applicable to the Commonwealth of Kentucky and has held:

> The concept of encroachment by one branch of government upon the functions of another was viewed as contrary to the foundation of our constitutional government in that it would ultimately result in one branch vastly exceeding the rightful power allocated to it. Kentucky Association of Realtors v. Musselman, Ky., 817 S.W.2d 213, 217 (1991).

The separation of powers doctrine precludes the Judicial Branch of government from seeking to substitute its judgment for an administrative determination made by the Executive Branch, and in particular, the Finance Secretary, the highest ranking finance official in the Executive Branch.

This Court has held, in American Telephone & Telegraph Co. et al. v. United States et al., 299 U.S. 232, 57 S.Ct. 170, 81 L.Ed. 142 (1936):

> This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be 'so entirely at odds with

> fundamental principles of correct accounting' [citation omitted] as to be the expression of a whim rather than an exercise of judgment. Id., 299 U.S. at 236-37, 57 S.Ct. at 172.

Further, this Court stated in Dismuke v. United States, 297 U.S. 167, 56 S.Ct. 400, 80 L.Ed. 561, rehearing denied, 297 U.S. 728, 56 S.Ct. 594, 80 L.Ed. 1011 (1936):

> If the statutory benefit is to be allowed only in his discretion, the courts will not substitute their discretion for his. [Citations omitted.] If he is authorized to determine questions of fact, his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, [citations omitted]; or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized, [citation omitted]. Id., 297 U.S. at 172, 56 S.Ct. at 403.

The Kentucky Supreme Court has also noted this separation of powers:

> In the closing portion of the opinion of the Burchett case, supra, it is pointed out that the judicial branch of government may not be called upon to question the discretionary power of an agency of the executive branch in order to determine what is in the public interest, including what particular property is needed in connection with a valid public project, unless there has been such a clear and gross abuse of discretion as to violate section 2 of the Constitution of Kentucky, which section is a guaranty against the exercise of arbitrary power. Commonwealth,

Department of Highways v. Vandertoll, Ky., 388 S.W.2d 358, 359-60 (1964).

In the present case, no party has contended the actions and subsequent ratification of the payment of the flight invoice by Executive Branch personnel, including Secretary Wells, represented a "clear and gross abuse of discretion" within the terms of Section 2 of the Kentucky Constitution.

State statutes and regulations grant to the Secretary of Finance the authority to act on behalf of the Executive Branch in determining whether flights are for a state purpose, regardless of when taken, and whether prior state approval is necessary before the Secretary can approve payment for a flight. The Kentucky Supreme Court may disagree with Secretary Wells' interpretation and application of the regulations at issue and may disagree with Executive Branch personnel who testified the dates on which the flights were taken were not relevant factors in approving the flight invoice. However, such a disagreement between the Judicial Branch and the Executive Branch as to the administrative determination that the state would pay for the flight is not a proper basis for criminalizing the conduct of Kelly. A majority of the Kentucky Supreme Court improperly declared the changing of dates on a travel invoice to be criminally deceptive even though those persons authorized by statute and the constitution to ratify state expenditures testified the travel dates were of no consequence in determining whether payment should be made.

It is respectfully submitted that petitioner Kelly was denied due process of law and equal protection under the law when the Judicial Branch encroached on the Executive Branch's discretion in violation of the constitutional doctrine of separation of powers.

3. The Petitioner Was Denied Due Process of Law and Equal Protection of the Law When Justice Stumbo Failed to Disqualify Herself and When Justice Stumbo Participated in the Majority Opinion of the Kentucky Supreme Court.

This Court held in Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974), when deciding whether a judge should be disqualified from hearing a case,

> the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.' Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964). 'Such a stringent rule may sometimes bar trial by judges who have not actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' but due process of law requires no less. Id., 418 U.S. at 501-02, 94 S.Ct. at 2704-05.

It has further been held by the Kentucky Court of Appeals, in Wells v. Walters, Ky., 501 S.W.2d 259 (1973):

> The unsuccessful litigant has also the right to know that the decision was the offspring of a fair and impartial mind, and this satisfying assurance he cannot have if there are before his eyes facts or circumstances reasonably sufficient to create the belief that influences outside of the record operated in making the decision. Id., at 260.

In the present case, the 4-3 Opinion of the Kentucky Supreme Court reversing the Opinion of the Kentucky Court of Appeals, was

decided on February 24, 1994. Justice Stumbo was part of the four member Majority Opinion. However, she was also a member of the Kentucky Court of Appeals at the time of that court's February 7, 1992 unanimous Opinion reversing petitioner Kelly's conviction. Oral argument in this case was presented to the Kentucky Supreme Court on January 13, 1993.

One of the Justices on the Court, Justice Dan Jack Combs, at the time of oral argument, resigned effective June 30, 1993. Sarah Combs was appointed as Associate Justice to serve until the November 1993 General Election. Justice Sarah Combs was defeated in the November election by Court of Appeals Judge Janet Stumbo. The Opinion of the Kentucky Supreme Court does not indicate whether Justice Sarah Combs participated in any manner in the decision of this case, although she was an Associate Justice of the court for some four months during the period of time the case was under submission; rather, the Opinion shows Justice Stumbo as part of the majority.

Another reason petitioner Kelly argues Justice Stumbo should have disqualified herself is because of her connection to petitioner Kelly. In 1992 Justice Stumbo's husband, Ned Pillersdorf, was a candidate in the Democratic Primary for Congress. Another candidate for that nomination was Bobby Rowe, from Pillersdorf's home county of Floyd County. Petitioner Kelly was a personal friend of Rowe's and became very actively and visibly involved in Rowe's campaign, being seen on several occasions in the company of Rowe by Justice Stumbo and her husband Pillersdorf.

This election was won by John Doug Hays from Pike County. Some time after the election, Pillersdorf expressed his belief that Rowe's presence in the race had cost Pillersdorf the election by splitting the votes in Floyd County. Petitioner Kelly argued his

involvement in this campaign against Justice Stumbo's husband was a factor in her vote to reverse a unanimous decision of the Kentucky Court of Appeals.

As has been recognized by Judicial Canons, statutes and case law, a judge should disqualify herself whenever a reasonable person might question the judge's impartiality. Liljeberg v. Health Services Acquisition Corp, 486 U.S. 847, 858, 108 S.Ct. 2194, 2202, 100 L.Ed.2d 855 (1988). See also Wells v. Walter, supra. As stated by this Court in Liljeberg:

> The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that 'his impartiality might reasonably be questioned' by other persons.... Moreover, advancement of the purpose of the provision--to promote public confidence in the integrity of the judicial process, [citation omitted]--does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew. As Chief Judge Clark of the Court of Appeals explained:
>
> > 'The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible. The judge's forgetfulness, however, is not the sort of objectively

> ascertainable fact that can avoid the appearance of partiality. [Citation omitted.] Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.'
>
> Contrary to petitioner's contentions, this reading of the statue does not call upon judges to perform the impossible--to disqualify themselves based on facts they do not know.... Rather, he is called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary. Id., 486 U.S. at 859-61, 108 S.Ct. at 2202-03.

While this Court was obviously concerned with disqualification of a federal judge in Liljeberg, this Court's rationale can and should be applied to the case at bar. Justice Stumbo may not have remembered petitioner Kelly's active role in the campaign in which her husband participated and may not have been aware that the Court of Appeals decision reversing Kelly's conviction was decided while she was a member of that court. However, once advised of this information in petitioner Kelly's Petition for Rehearing, the Kentucky Supreme Court violated constitutional principles of due process and equal protection by failing to remedy the situation by removing Justice Stumbo's vote from the Majority Opinion of that court. Because the facts were timely brought to Justice Stumbo's attention in the Petition for Rehearing and because they are the kind of facts that create the appearance of impropriety which must be avoided, the Kentucky Supreme Court's Opinion should be reversed by this Court.

It is respectfully submitted that petitioner Kelly was denied due process of law and equal protection under the law when Justice Stumbo failed to disqualify herself and when Justice Stumbo participated in the Majority Opinion of the Kentucky Supreme Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 21, 1994

APPENDIX

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Appendix A

SUPREME COURT OF KENTUCKY

92-SC-161-DG

Commonwealth of Kentucky **Appellant**

On Review From Court of Appeals

v. **90-CA-1769-MR**

Franklin Circuit Court No. 89-CR-124

Ward Burnette, John D. Wolf, and John Kelly **Appellees**

Opinion of the Court by Justice Leibson Reversing

Ward Burnette and John D. Wolf were convicted in the Franklin Circuit Court of theft by deception and were sentenced to fines of $5,000 for their part in deceiving the Commonwealth into paying $5,435.79 for two unauthorized chartered airplane flights taken in December, 1987. John Kelly was convicted of complicity to theft by deception and sentenced to a fine of $2,500 for his part in promoting the deception. These convictions were reversed by the Court of Appeals. We granted discretionary review and, as there was ample evidence to support the convictions, reverse the Court of Appeals and affirm the judgments entered by the trial court.

Burnette was elected Commissioner of Agriculture in November, 1987. Wolf had taken a leave of absence from his job in the Department of Agriculture from September, 1987 to January, 1988; however, he was still on the state payroll. There

was testimony that during his leave of absence, Wolf had no official function with the Department of Agriculture. Wolf was subsequently appointed as the Deputy Commissioner of Agriculture.

On December 14 and 15, 1987, after the election but prior to Burnette's assuming office, Burnette, Wolf, and two other private citizens, Bruce Harper (farm manager for then Governor-Elect Wallace Wilkinson) and Harold Duckworth (a Cynthiana farmer), took two privately chartered airplane flights from Lexington, Kentucky. There was testimony that the men first flew to Chicago and met with officials of the American Haytech Corporation who had earlier expressed an interest to Duckworth in the possibility of developing a hay processing facility in Cynthiana. There was also testimony that the next day the same group flew to Washington, D.C., and met with officials of the Foreign Agriculture Service with the United States Department of Agriculture. However, John Moore, Assistant Director of Administrative Services of the Kentucky Agriculture Department, testified that he had talked to Wolf several times regarding the bill and that no mention was made of the hay program which was the claimed purpose of these trips. During one conversation with Wolf, Burnette was also present and Burnette and Wolf talked about the flight and that it was a "celebration" for the election.

Both chartered flights were arranged at Harper's request by Angela Hicks, an employee of Wilkinson Flying Service. Hicks testified, and Harper denied, that Harper instructed her to list the flight dates as January 4 and 5 because the Department of Agriculture might not pay for flights taken in December before Burnette took office.

Angelina Bennett, an employee of the Department of

Agriculture, received the bill for processing. She testified that the dates caught her attention because one of the dates was the same day Burnette was in Frankfort being sworn in as Agriculture Commissioner. An additional problem was that the bill was on Wilkinson Flying Service stationery--a potential conflict of interest if the Governor's company was doing business with the state.

Burnette and Wolf subsequently met with Rogers Wells, the Secretary of Finance and Administration. Burnette asked Wells if Wells could help him get the bill paid and told Wells that, although the bill was from Wilkinson Flying Service, the plane did not belong to Wilkinson Flying Service. Appellees Burnette and Wolf testified that Burnette told Wells that the flights were in December, 1987. However, Wells testified that neither Burnette nor Wolf told him that the January dates were erroneous.

Wells turned the bills over to his chief assistant, appellee Kelly. Wells testified that he told Kelly that the Commonwealth could not pay for a flight by a plane owned by the Governor and directed him to pay the invoices if they should be paid, and, if not, to reject them.

Kelly contacted Angela Hicks, who informed him that the plane was actually owned by Central Rock Company. Hicks testified that Kelly instructed her to submit new invoices from Central Rock and to leave Harper off the passenger list. She also testified that Kelly told her he did not want the bill to indicate the flights had occurred only one day apart and to alter the flight dates to January 14 and 20. Hicks further testified that Kelly said he did not want to know when the trips actually occurred and did not comment when she told him they were taken in December. Kelly testified that he only asked Hicks to change the bills to Central

Rock letterhead after learning that Central Rock, not Wilkinson Flying Service, owned the plane and denied asking Hicks to change the dates because they were unimportant to him; only the Wilkinson letterhead was a problem.

Hicks changed the dates to January 14 and 20, 1988, left Harper's name off the passenger list, and sent the new bills, on Central Rock letterhead, to Military Affairs. Military Affairs pays for all state government flights and is then reimbursed by the appropriate agencies. Military Affairs questioned the bills because they were not accompanied by certain forms which should have been sent by the Agriculture Department. The invoices were ultimately paid, however, following Burnette's assurances that the appropriate forms would be forwarded. Military Affairs issued a $5,435.79 check to Central Rock for the two flights.

The inter-account bill sent by Military Affairs to the Agriculture Department was approved by Wolf, and Military Affairs was reimbursed by Agriculture Department funds. The events in question came to light during an annual audit of the Agriculture Department when it was noted that Burnette was in Hopkinsville on the day given for the first flight and in Atlanta on the day given for the second flight.

Burnette and Wolf were charged with theft by deception for making the two unauthorized flights and then charging the flights to the Commonwealth and creating a false impression as to their authority to do so. The false impression was created through invoices bearing false information indicating that the flights had been taken after the date Burnette had taken office as Commissioner of Agriculture. Kelly was charged with complicity to theft by deception by directing Wilkinson Flying Service personnel to resubmit the bill on an invoice from a different

company and to include information on the invoice which he knew was inaccurate. The jury found all three men guilty. Harper was also charged with complicity to theft by deception but was acquitted.

KRS 514.040, Theft by Deception, reads in pertinent part:

> (1) A person is guilty of theft by deception when he obtains property of another by deception with intent to deprive him thereof. A person deceives when he intentionally;
>
> (a) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind;
>
> ...
>
> (c) Fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship....

The evidence shows that Burnette, Wolf, and Kelly induced false invoices to be prepared and submitted through channels and failed to correct the false impressions those invoices created as to the dates of the flights. These false invoices specified flight dates in January, 1988, dates which, if true, would have justified payment of the charges incurred, because Burnette was at that time Commissioner of Agriculture. The Department of Military Affairs issued a check to Central Rock in payment of the false invoices.

Burnette knew theft by deception had occurred. When interviewed by State Police during their investigation in this matter, Burnette admitted he "had no authority" to incur an expense of this nature on behalf of the Commonwealth of

Kentucky at the time the flights were taken. There was ample evidence from which the jury could find all three appellees knew of the deceptive bills.

Although the statute is "silent on the question of the necessity of victim's reliance on the false impression," reliance is "a necessary element under KRS 514.040." Brown v. Commonwealth, Ky., 656 S.W.2d 727, 728 (1983). The Court of Appeals reversed the convictions because Secretary of Finance Rogers Wells "testified that the erroneous flight dates were of no consequence when considering payment." Actually, Wells testified that if the facts were as the defense attorneys put them and if the proper documentation was provided, then he would have approved payment of the bills. Also, Wells went on to testify that he would have had to consult with his attorney to determine if an incoming commissioner and an on leave employee would have been eligible for reimbursement since he had not looked into the matter that closely. The Adjutant General testified that had he known the true dates of the flight, it would have been an issue. The evidence remains that neither Wells nor Military Affairs was given the opportunity to approve payment for the actual flights and determine if they should pay for flights before Burnette became Commissioner. The proper documentation for December flights was also never provided. Thus, payment to Central Rock was made in reliance on the erroneous flight dates.

Appellees point out KRS 514.040(2), which provides:

> "The term 'deceive' does not, however, include falsity as to matters having no pecuniary significance...."

Burnette and Wells claim, of course, that the trips were intended to benefit the Department of Agriculture and that Wells' testimony shows the flights would have been paid for even had

the correct dates been known. However, the only Department of Agriculture employee on the trips was Wolf and he was on an extended leave of absence at the time. Testimony indicated that only two people within the Agriculture Department had the authority to authorize plane flights in December, 1987, and no one on the trip was authorized by either of those persons to conduct any business or perform any official service for either the Department or for the Commonwealth at that time. The flights were wholly unauthorized.

Whether these flights were for personal or for public benefit, or for both, is beside the point. If indeed the four persons on board on these trips were seeking to confer a benefit on the State of Kentucky, they were doing so as private citizens and not as "persons in the official service of the Commonwealth," as required by 200 KAR 2:006, Sec. 2(3), before being eligible for reimbursement.[1] In addition, 200 KAR 2:006, Sec. 4(1) provides that travel must be authorized in advance.[2] These flights were not authorized in advance.

The false statements made to obtain payment for these flights obviously had "pecuniary significance." Unless the dates were changed, payment from state funds was not authorized. Everyone concerned in this deception was well aware of this fact, including Finance Secretary Wells who testified after the fact that if the facts were as the defense attorneys stated them and if he received the

---

[1] "...no reimbursement can be claimed for expenses of any person other than employees, bona fide wards, or other persons in the official service of the Commonwealth." Only necessary expenses of official travel will be reimbursed."

[2] No travel expenses shall be reimbursed unless the travel was authorized in advance as follows: (a) Travel...within the other forty-nine (49) states...must be authorized by the agency head or a designated representative....

proper documentation, he would have authorized payment for these flights even though they took place in December. As a matter of law this means, at most, he would have done so if he could have done so. No statute or regulation empowered him to do so.

Rogers Wells had no authority as Finance Secretary to accept responsibility on behalf of the Commonwealth of Kentucky for payment for these flights, even had he so chosen when the invoices were presented.

> There is no provision of the law recognizing the Commissioner of Finance as the final arbiter of the legality of a claim against the Commonwealth. Raney v. Stovall, Ky., 361 S.W.2d 518, 520 (1962).

The Secretary of Finance makes the final interpretation of the travel expense and reimbursement regulations, 200 KAR 2:006, Sec. 2(4), and KRS 42.012 designates the Secretary of the Finance and Administration Cabinet as "the chief financial officer of the state" and specifies that he shall "protect the financial interest of the state," but nothing in either 200 KAR 2:006 or KRS 42.012, together or separately, authorized payment at the time the flights were made or provided authority for the Secretary of Finance to authorize payment after the fact.

Wells' testimony at trial was a weak effort to explain the unexplainable, and the jury recognized it as such. His testimony had no evidentiary value, but assuming the contrary, at most it created an evidentiary conflict with other evidence explaining the procedure necessary to authorize and obtain payment for chartered flights, testimony from Michael Davidson, the Adjutant General, and Hank Lindsay, Director of Air Transport for Military Affairs, the agency charged with responsibility for processing payment for state government charter flights. Wells' evidence falls far short of

providing a reason to hold there was a failure of proof that a theft took place.

Contrary to appellees' contention, and unlike the victims in Rowland v. Commonwealth, Ky., 355 S.W.2d 292 (1962) and Palmer v. Commonwealth, Ky., 479 S.W.2d 613 (1972), the Commonwealth did not receive that for which it paid. Military Affairs paid Central Rock and was reimbursed by the Agriculture Department for what appeared to be January trips by the Commissioner of Agriculture to represent the Commonwealth on official business. The Commonwealth received trips taken in December by private individuals who had no authority to conduct Agriculture Department business.

Frazier v. Commonwealth, 291 Ky. 467, 165 S.W.2d 33 (1942) recognized that the victim, or someone on behalf of the victim, cannot condone a theft by deception after it occurs and thus excuse the crime.

> The inherent error in appellant's argument is the assumption that criminal prosecutions are for the protection and benefit of the person injured. The true purpose is to protect the public by punishing the criminal and preventing crime. The gist of the offense of obtaining money or property of another by false pretenses is the fraud and deception of the perpetrator, his motives and the results--the fact that a person was deceived and defrauded. (Citations omitted.) Frazier at 34.

It was not Wells' money that was stolen; it was money belonging to the Commonwealth of Kentucky, and Wells cannot condone the crime.

Kelly argues that his participation in the alleged deception did not occur until after the flights. The evidence indicated that Kelly

told Angela Hicks to change the dates and knew the dates were wrong. The bills were then submitted through channels and paid. Kelly's participation occurred before payment for the flights and was instrumental in causing payment.

The Court of Appeals held the trial court erred in not granting appellees' motions for directed verdict. In ruling on a motion for directed verdict,

> the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

The appellate standard of review for a directed verdict is, "[i]f under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal." Commonwealth v. Sawhill, Ky., 660 S.W.2d 3, 5 (1983).

There was ample evidence from which it was not unreasonable for the jurors to find the appellees guilty. Accordingly, the opinion of the Court of Appeals is reversed, and the final judgments entered by the trial court are affirmed.

Leibson, Reynolds, Stumbo, and Wintersheimer, JJ., concur.

Special Justice Jerry Gilbert dissents by separate opinion in which Lambert and Spain, JJ., join.

SUPREME COURT OF KENTUCKY

92-SC-161-DG

Commonwealth of Kentucky **Appellant**

On Review From Court of Appeals

v. **90-CA-1769-MR**

Franklin Circuit Court No. 89-CR-124

Ward Burnette, John D. Wolf, and John Kelly **Appellees**

Dissenting Opinion by Special Justice Jerry W. Gilbert

Respectfully, I dissent.

In order to establish a theft by deception, it must be shown that a defendant obtained something to which he was not otherwise entitled. Palmer v. Commonwealth, Ky., 479 S.W.2d 613 (1972). The offense is not established if the "victim" of the offense received what was bargained for or if predicated upon matters which have no pecuniary significance. Sanson v. Commonwealth, Ky., 233 S.W.2d 258 (1950); Rowland v. Commonwealth, Ky., 355 S.W.2d 292 (1962); and Davis v. Commonwealth, Ky. App., 564 S.W.2d 33 (1987). Nor is the offense established without proof of reliance by the "victim" on the alleged deception or misrepresentation. Brown v. Commonwealth, Ky., 656 S.W.2d 727 (1983). In short, where an alleged deception did not cause the theft or was not the means of the theft, there can be no theft by deception.

Clearly, as pointed out by the majority opinion, sufficient proof was adduced at trial for a reasonable juror to believe beyond

a reasonable doubt that Burnette, Wolf, and Kelly acted to deceive in submitting the invoices containing the false dates. However, there must also be sufficient proof of the same nature that the commonwealth relied upon the deception in rendering payment. Brown v. Commonwealth, Supra. In this regard, there is an absence of proof that the flights were not for the purpose of promoting the agricultural interest of Kentucky or that the Commonwealth would not have paid for the flights had the actual dates been revealed. It was the Commonwealth's burden to adduce this proof, and it failed to do so.

At the time of the flights, Burnette was Commissioner-Elect of the Department of Agriculture. The flights involved were for the stated purpose of obtaining information and contacts for the potential establishment of a hay program and international marketing office in Kentucky. Reimbursement for travel expenses by the state is not limited to state employees, but rather includes those "persons in the official service of the Commonwealth." 200 KAR 2:006, Sec. 2(3). There is no proof that the flights were not made for a public purpose, and therefore were subject to payment by the state. Again, this was the Commonwealth's burden to prove.

Despite the Commonwealth's reliance on the false flight dates as the only evidence of misrepresentation or deception by the defendants, the state finance officials testifying at trial stated that the dates on the invoices were not the determining factor in authorizing payment. Rogers Wells, Secretary of Finance and Administration, specifically testified that the false dates were of no consequence, and he would have authorized payment even if the had known that the flights occurred in 1987. The Secretary of Finance is the chief financial officer of the state and is charged

with the ultimate decision whether travel expenses are to be reimbursed by the Commonwealth. KRS 42.012. Under 200 KAR 2:006, Sec. 2(4), the Secretary's interpretation of the regulations involving travel expense and reimbursement is final.[1] The Secretary's testimony concerning whether he would authorize the payment of the invoices knowing the flights occurred in 1987 was as follows:

Q. If those facts had been presented to you that the trip had been in December and all these other facts that I've mentioned and those facts had been presented to you, would you have authorized the payment of that bill, assuming that it was up to you to do that?

A. Yes, sir.

Q. And under the regulations, you have the right to declare whether or not there should be a reimbursement for travel expenses based upon all these conditions that we've spoken about, have you not, sir?

A. Yes, sir.

Q. And would you, sir, certify that the travel expenses should have been reimbursed under those circumstances that I have described to you?

A. Yes, sir.

Q. All right. When I say "reimbursed," I mean paid to the person that has the money coming; is that correct, sir?

A. With proper documentation, the invoice would have been paid, yes sir.

---

[1] "All final interpretations of this Regulation shall be made by the Secretary of Finance and Administration, and such determination shall be final and conclusive."

Q. All right. And if that trip had been taken without getting a prior approval from military affairs, it could still be paid for, even though that didn't take place and they get subsequent approval; isn't that correct, sir?

A. That is correct, sir.

Q. And that would be your official interpretation of the state's right to pay this bill; is that correct, sir?

THE WITNESS: That would be my official interpretation?

MR. HADDAD: Yes, sir.

A. As secretary of finance cabinet --

MR.- HADDAD: Yes.

A. --I would have approved the bill had I known the facts as I understand them from the testimony.

Q. Even though the trip was in December?

A. That wouldn't have had any bearing on it.

From the foregoing, it is clear that, irrespective of the leading nature of the questions to Mr. Wells, ("if the facts were as the defense attorneys put them...," Majority Opinion at ____), the proof was that the bill would have been paid regardless of the incorrect date.

The Commonwealth is charged with proving every element of the offense beyond a reasonable doubt. No witness testified that any state official relied on the erroneous flight dates in the determination to issue payment. No witness testified that the invoices would not have been paid had the correct dates been known. In fact, the proof was to the contrary.

The reliance of the Majority Opinion on Raney v. Stovall, Ky., 381 S.W.2d 318 (1962) disregards the distinguishing facts upon which that decision was founded. Raney should be specifically limited to the authority of a public officer to question

the validity of a claim against the state and refuse to disburse public funds on the ground that to do so would violate the constitution. It is not alleged, nor proven, that in this case the payment of the invoices would be violate of the Kentucky Constitution. KRS 42.012 and 200 KAR 2:006, Sec. 2(4) clearly authorize the Secretary of Finance to conclusively determine the payment of travel expenses and reimbursement.

There being no evidence upon which a reasonable jury could find the false flight dates were relied on by the Commonwealth to issue payment for the flights, I would hold that the trial court improperly overruled the defendant's motion for directed verdict and would affirm the court of Appeals.

Lambert and Spain, JJ., join in this dissent.

Appendix B

SUPREME COURT OF KENTUCKY

92-SC-161-DG

Commonwealth of Kentucky **Appellant**

On Review From Court of Appeals

v. **90-CA-1769-MR**

Franklin Circuit Court No. 89-CR-124

Ward Burnette, John D. Wolf, and John Kelly **Appellees**

Order

The petitions for rehearing of this Court's Opinion rendered on February 24, 1994, are hereby denied. Justice Stumbo declines to recuse.

Lambert, Leibson, Reynolds, Spain, Stumbo, and Wintersheimer, JJ., and Gilbert, Special Justice, concur. Stephens, C.J., not sitting.

ENTERED: June 23, 1994.

Appendix C

SUPREME COURT OF KENTUCKY
92-SC-161-DG

Commonwealth of Kentucky **Appellant**

On Review From Court of Appeals
v. **90-CA-1769-MR**
Franklin Circuit Court No. 89-CR-124

Ward Burnette, John D. Wolf, and John Kelly **Appellees**

Petition for Rehearing of Appellee John Kelly

ARGUMENT

I. Majority Opinion Encroaches on Executive Discretion in Violation of Constitutional Separation of Powers and in Violation of Appellees' Due Process Rights as Protected by the United States Constitution.

This Court, in a 4-3 split decision, reversed the Opinion of the Court of Appeals which had reversed the convictions below. As can be seen by even a brief review of the Majority Opinion, this Court had stated its judgment in administrative matters in lieu of the determinations made by members of the Executive Branch, such as: Mitchell Payne, a Commissioner in the Finance Cabinet; Robert Kellog, Military Affairs; Hank Lindsey, Military Affairs; Mike Davidson, Military Affairs; and, in particular, Finance

Secretary Rogers Wells. Secretary Wells was designated by statute and regulation to administer and interpret the travel relations at issue in this case.

In late January of 1988, Burnette and Wolf took the airline flight invoice to Secretary Wells to seek his guidance and approval in getting the unpaid invoice processed by the state. As Secretary Wells testified, it was common for such inquiries to be made of him where the state had not paid a particular invoice. (T.R. 590).

The essence of Secretary Wells' testimony was that the erroneous information he was provided back in early 1988, such as the date the flights were taken, was not factually relevant to him in approving the payment of the invoice. Even when Secretary Wells was presented with the true state of facts at trial, he testified that as Finance Secretary, he would have authorized payment of the invoice and that it was appropriate for the state to pay the invoice. (T.R. 593).

The Majority Opinion inaccurately refers to the persons on that flight as being "private citizens." In particular, the Appellee, Burnette, was a State Representative and was the Commissioner-elect of the Department of Agriculture. Further, the Appellee, Wolf, was a high ranking official from the Department of Agriculture who was on a paid leave of absence as a member of the transition team.

Secretary Wells testified that the flight invoice could still be paid by the state even if the trip had been taken without prior approval from Military Affairs. As Secretary Wells testified:

MR. HADDAD: And that would be your official interpretation of the state's right to pay this bill; is that correct, sir?

MR. WELLS: That would be my official interpretation?

MR. HADDAD: Yes, sir.

MR. WELLS: As Secretary of the Finance Cabinet --

MR. HADDAD: Yes.

MR. WELLS: --I would have approved the bill had I known the facts as I understand them from the testimony." (T.E. 594-95).

The Majority Opinion represents an encroachment into areas of administration granted to the Executive Branch by the Kentucky Constitution and statutes. Under principles of law established and consistently reaffirmed by this Court, the Majority Opinion represents a deviation from the separation of powers doctrine. Furthermore, this encroachment represents a denial of the Appellees' due process and equal protection rights under the Kentucky and the United States Constitutions.

In Kentucky Association of Realtors v. Musselman, Ky., 817 S.W.2d 213 (1991), this Court applied Sections 27 and 28 of our Constitution. This Court held:

> "The concept of encroachment by one branch of government upon the functions of another was viewed as contrary to the foundation of our constitutional government in that it would ultimately result in one branch vastly exceeding the rightful power allocated to it." (817 S.W.2d at 217).

And, in Legislative Research Commission v. Brown, Ky., 664 S.W.2d 907 (1984), this Court held:

> "It has been our view, in interpreting Sections 27 and 28, that the separation of powers doctrine is fundamental to Kentucky's tripartite system of government and must be

'strictly construed.'" (Citations omitted) (664 S.W.2d at 912).

In particular, the separation of powers doctrine precludes this Court from seeking to substitute its judgment for an administrative determination made by the Executive Branch, and in particular, the Finance Secretary, the highest ranking finance official in-- the Executive Branch. As this Court stated in Commonwealth, Department of Highways v. Vandertoll, Ky., 388 S.W.2d 358 (1964):

> "In the closing portion of the opinion of the Burchett case, supra, it is pointed out that the judicial branch of government may not be called upon to question the discretionary power of an agency of the executive branch in order to determine what is in the public interest, including what particular property is needed in connection with a valid public project, unless there has been such a clear and gross abuse of discretion as to violate Section 2 of the Constitution of Kentucky, which section is a guaranty against the exercise of arbitrary power." (383 S.W.2d at 359-60).

In the present case, no party has contended that the actions and subsequent ratification of the payment of the flight invoice by Executive Branch personnel, including Secretary Wells, represented a "clear and gross abuse of discretion" within the terms of Section 2 of the Kentucky constitution. Moreover, as the evidence at trial demonstrated, the Appellee Kelly played no more significant role in approving the invoice's payment than did the other members of the Executive Branch previously mentioned. In addition, the dates on the invoice had already been altered, without Kelly's prior knowledge, when the invoice was first

submitted to him. (T.R. 1607, 1700).

State statutes and regulations grant to the Secretary of Finance the authority to act on behalf of the Executive Branch in determining whether flights are for a State purpose, regardless of when taken, and whether prior state approval is always necessary before the Secretary can approve payment for a flight.

A majority of this Court may disagree with Secretary Wells' interpretation and application of the regulations at issue. Moreover, a majority of this Court may disagree with the other Executive Branch personnel who testified that the date on which the flight was taken was not a relevant factor in approving the flight invoice. However, such a disagreement between a majority of this Court and the Executive Branch as to the administrative determination that the state would pay for the flight is not a proper basis for criminalizing the conduct of Kelly. A majority of this Court has improperly declared that the changing of dates on a travel invoice is criminally deceptive even when those persons authorized by statute and the constitution to ratify state expenditures have testified that the travel dates were not relevant in determining whether payment should be made.

The Respondent, Kelly, respectfully submits that the Majority Opinion of this Court has misconstrued the law and the facts of this case. As a result, the Majority Opinion represents a departure from the established doctrine of separation of powers.

II. Justice Stumbo Should be Disqualified and Her Vote Struck From the Opinion.

On February 24, 1994, this Court, by a 4-3 split decision, reversed the February 7, 1992 Opinion of the Kentucky Court of

Appeals. A copy of that Opinion is attached hereto as Appendix A. Justice Stumbo was part of the four member Majority Opinion. However, Justice Stumbo was also a member of the Kentucky court of Appeals at the time of that Court's February 7, 1992 unanimous Opinion. As a result, Justice Stumbo is disqualified from voting in this case.

Oral arguments were presented before this Court on January 13, 1993. One of the Justices on the Court at that time, Justice Dan Jack Combs, resigned effective June 30, 1993. Governor Brereton Jones appointed Sarah Combs as the Associate Justice to serve until the November, 1993 General Election. The February 24, 1994 Opinion of this Court does not indicate whether Justice Sarah Combs participated in any manner in the decision of this case, although she was an Associate Justice of this Court for some four months during the period of time this case was under submission. On November 2, 1993, Justice Stumbo was elected to complete the unexpired term of Justice Dan Jack Combs. On February 24, 1994, this Court rendered its Opinion reversing the prior decision of the Court of Appeals.

There is a far more important issue in support of the Appellee Kelly's position that Justice Stumbo should be disqualified from sitting as a Justice in the opinion of this case. Justice Stumbo's husband, attorney Ned Pillersdorf of Prestonsburg, Kentucky, was a candidate in 1992 in the Democratic Primary for Congress. Another candidate for that Democratic nomination was attorney Bobby Rowe, also from Mr. Pillersdorf's home county of Floyd County. Prior to Mr. Rowe's entry into the race, Pillersdorf was considered to be one of the leading contenders in the race.

Kelly was a personal friend of Mr. Rowe and Rowe's Campaign Manager Dale Emmons. At their request, Kelly became

very actively and visibly involved in Mr. Rowe's campaign, being seen on several occasions in the company of Rowe and Emmons by Justice Stumbo and her husband Pillersdorf. Attached hereto as Appendix B and C are the Affidavits of Dale Emmons and the Appellee Kelly, outlining Kelly's active and visible role in this election.

This election was won by Attorney John Doug Hays from Pike County. Some time after the election, as stated in Mr. Emmons' Affidavit, he discussed the race with Pillersdorf, and Pillersdorf expressed his belief that Bobby Rowe's presence in the race had cost Pillersdorf the election by splitting the votes in Floyd County. The Appellee Kelly feels strongly that his involvement in this campaign against Justice Stumbo's husband was a factor in her vote to reverse a unanimous decision of the Court of Appeals, a court of which she previously was a member.

As has been recognized by the Judicial Canons, the statutes, and the case law, a judge should disqualify himself whenever a "reasonable person might question the judge's impartiality." Wells v. Walter, Ky., 501 S.W.2d 259 (1973), KRS 26A.015(2)(e), and SCR 4.300, Canon 3(0). This Court, in Wells v. Walter, discussed the important policy considerations behind judicial disqualification, holding:

> "The judge is not the only one concerned in the just and correct course of justice. Nor, indeed, are the litigants the only ones to be consulted. The public generally have the right to feel that there is no favoritism in the courthouse; that there all men stand equal before the law, and that there justice will be dispensed to all with an even hand. The fact that the judge may be unconscious of any bias, and may be sure that interest or relationship could not

dispose him to favor one side or the other, is not enough." (501 S.W.2d at 260).

And, in Ledford v. Hubbard, 236 Ky. 373, 33 S.W.2d 345, 346 (1930), this Court held:

> "When a judicial officer is called upon to decide controversies between the people, to avoid distrust, he should recuse himself if any substantial ground exists for a suspicion that he is not wholly disinterested. That is the demand of public policy."

In Wells, this Court went on to quote from Dotson v. Burchett, 301 Ky. 28, 190 S.W.2d 697, 700 (1945), holding:

> "Any doubt of qualification, therefore, should be resolved in favor of a party questioning it, bona fide, and upon grounds having substance and significance."

In Poorman v. Commonwealth, Ky., 782 S.W.2d 603, 606 (1989), this Court stated that a "common sense approach" was to be used in applying the disqualification language of Canon 3(c). Most recently, in Lovett v. Commonwealth, Ky. App., 858 S.W.2d 205, 208 (1993), the Kentucky Court of Appeals, (in a decision written by then-Judge Stumbo), cited Poorman for the proposition that a judge should disqualify himself "where his impartiality might reasonably be questioned."

The disqualification of a Judge of a court of last resort who had served as a judge on the intermediate appellate court at the time of the rendition of the intermediate court's decision by the highest court, is a matter of simple logic and common sense. As stated in Wells v. Walter:

> "It is a universally recognized tradition of the law that the appearance of impartiality is next in importance only to the fact itself. It cannot be sacrificed to convenience." (501

S.W.2d at 260).

Under established law, if a reasonable person would question the judge's impartiality, the judge should be recused from consideration of the merits of the case. As set forth in Kelly's Affidavit, had he known that Justice Stumbo was going to participate in the decision of his case, he would have directed his counsel to file a Motion for her disqualification because of Kelly's involvement in the campaign against Justice Stumbo's husband.

As further grounds for the disqualification of Justice Stumbo, the Appellee notes that Justice Stumbo did not participate in the Oral Argument of this case and therefore did not participate in the vote of this Court to the extent that the vote was taken immediately after the January 13, 1993 Oral Argument. On the other hand, Justice Dan Jack Combs, who was ultimately succeeded by Justice Stumbo, did participate in the Oral Argument and would have participated in any vote taken by this Court immediately after Oral Argument.

It is counsel's understanding that under Supreme Court procedure, a vote is taken immediately following Oral Argument with a Justice being assigned to write the Majority Opinion. Any vote result taken immediately after Oral Argument which is contrary to the Opinion of this Court of February 24, 1994 is violative of the Appellee's due process and equal protection rights under the Kentucky Constitution and the United States Constitution.

The Appellee notes that Justice Dan Jack Combs was reappointed a Special Justice in Jacobs v. Commonwealth, 89-SC-703-MR, rendered January 31, 1994, approximately six months after the effective date of Justice Combs' resignation from this

Court, and approximately three weeks before the February 24, 1994 Opinion in the present case. The very idea that former Justice Dan Jack Combs could participate in a decision of this Court on January 31, 1994, but not participate in the decision of this case, only three weeks later, a case in which he had heard Oral Argument, lends further credence to Appellee Kelly's belief that the participation of Justice Stumbo in the Majority Opinion against him is the result of bias on her part against Kelly.

The appearance of bias can easily be corrected by having former Justice Dan Jack Combs appointed to participate in the decision of the present case. The option of appointing Justice Combs as a Special Justice, given his participation in the Oral Argument and any vote that would have been taken prior to this resignation, is an appropriate and available remedy in the present case given the prior use of that procedure by this Court in Jacobs.

The Appellee respectfully submits that Justice Stumbo's participation in this Court's Opinion represents a denial of the Appellees' equal protection and due process rights as protected under the United States Constitution.

CONCLUSION

A majority of this Court apparently disagrees with the administrative determination made by various members of the Executive Branch in approving the payment of the airplane flight invoice at issue in this case. However, the alleged erroneous information concerning the dates on which the flights were taken which formed the basis of the Theft by Deception charge were simply not relied on by the Executive Branch personnel in approving the payment of the invoice. A majority of this Court

may feel that those various Executive Branch personnel should not have so interpreted and applied he regulations. However, that belief was also shared by Finance Secretary Wells, who, pursuant to regulation, is authorized to make the final and conclusive interpretation and application of those regulations. The Majority's objection to this administrative determination made by personnel in the Executive Branch does not extend to making the conduct of the Appellees, and in particular, John Kelly, subject to criminal sanction.

In addition, the Appellee Kelly respectfully submits that Justice Stumbo should be disqualified from participating in the decision of this case, and her vote should be struck from the Opinion of this Court. As a result, pursuant to SCR 1.020(1)(a), the Opinion of the Court of Appeals should stand affirmed since the vote of the Court is equally divided if the vote of Justice Stumbo is stricken. In the event a Special Justice is to be appointed, the Appellee requests that the procedure employed in Jacobs be used in the present case.

In Wells v. Walter, this Court stated:

> "The unsuccessful litigant has also the right to know that the decision was the offspring of a fair and impartial mind, and this satisfying assurance he cannot have if there are before his eyes facts or circumstances reasonably sufficient to create the belief that influences outside the record operated in making the decision." (501 S.W.2d at 260).

In the present case, the Appellee has presented with this Court "facts and circumstances" as identified in Wells v. Walter as would entitle him to the relief requested in this Petition.

Alternatively, the Appellee, John Kelly, submits that the

Majority Opinion represents a departure from the separation of powers doctrine, and a denial of due process and equal protection violation of the Kentucky and the United States Constitutions.

The Appellee Kelly further adopts the arguments raised in any Petitions for Rehearing filed by any other Appellee.

/s/ FRANK E. HADDAD, JR.
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Louisville, Kentucky 40202
(502) 583-4881
Counsel of Record for Petitioner

AFFIDAVIT

I, Dale C. Emmons, being first duly sworn and by way of this Affidavit states the following:

My name is Dale C. Emmons, and I reside at 102 Kelsey Drive, Richmond, Kentucky 40475-1171. I was employed as the general campaign consultant to the BOBBY ROWE FOR CONGRESS CAMPAIGN from early 1992 through May 1992. In that capacity, I had overall management responsibility for the campaign which included employing other consultants, devising a media strategy, and other functions normally associated with this type effort. In February of 1992, I asked John Kelly to assist me in helping our mutual friend, Bobby Rowe, in Mr. Rowe's campaign for Congress. Mr. Kelly agreed to this and he played a key, active, and visible role in this campaign. Mr. Kelly traveled with the candidate, assisted in media-press strategy, and was instrumental in recruiting two of our campaign's subcontractor/consultants.

Mr. Rowe's opponents in this Democratic Primary included

Mr. John Doug Hays, Mrs. Carol Hubbard, and Mr. Ned Pillersdorf. Mr. Hays won the contest and Mr. Pillersdorf finished in second place. Throughout the campaign, Mr. Kelly traveled with Mr. Rowe to the many campaign events, including debates, parades, and speeches. At these events, many candidates were present including Mr. Pillersdorf. There was at least one occasion where Mr. Pillersdorf and his wife, Justice Janet Stumbo, were eating lunch at the Jenny Wiley State Park Lodge when Mr. Rowe, Mr. Kelly, and myself were present.

After the campaign, I had the opportunity to discuss with Mr. Pillersdorf the campaign and its dynamics. Mr. Pillersdorf stated that Mr. Rowe's vote totals surprised him. He speculated that Mr. Rowe (who, like Mr. Pillersdorf, lives in Floyd County) had deprived him (Pillersdorf) of votes, thus perhaps changing the campaign outcome. The election results were:

(1) John Doug Hays	18,454 (the winner)
(2) Ned Pillersdorf	10,586
(3) Carol Brown Hubbard	10,453
(4) Robert Rowe, Jr.	10,452

I give this Affidavit voluntarily, and of my own free will, and I further certify that the statements contained herein are true and correct.

/s/ Affiant, Dale C. Emmons

STATE OF KENTUCKY)

) SCT.

COUNTY OF MADISON)

I, the undersigned Notary Public in and for the State and County aforesaid, do hereby certify that the foregoing was this

date produced to me by and DALE C. EMMONS signed the acknowledged by him to be his free and voluntary act and deed for the purpose therein stated.

IN TESTIMONY WHEREOF, witness my hand and official seal of office hereto this 14th day of March, 1994.

My Commission Expires: 6/9/96.

/s/ Sandra M. Gibbs
Notary Public
Kentucky State at Large

AFFIDAVIT

Comes the Affiant John Kelly and after first being duly sworn states as follows:

1. I am the Defendant-Appellee in the case of Commonwealth of Kentucky v. Ward Burnette, John D. Wolfe, and John Kelly.

2. In the spring of 1992, I became involved on behalf of Attorney Bobby Rowe of Prestonsburg, Kentucky, in Mr. Rowe's campaign for the Democratic nomination for Congress from the Fifth Congressional District.

3. I worked almost full time in a very active and highly visible role in the campaign, working closely with Mr. Rowe and his Campaign Manager Dale Emmons.

4. Ned Pillersdorf, the husband of Justice Janet Stumbo and also an attorney from Prestonsburg, Kentucky, was also a candidate for the Democratic nomination and was considered one of the top contenders in the race, before Mr. Rowe from his home county got into the race.

5. On more than one occasion, I was with Mr. Emmons and

Mr. Rowe in public, where I was seen with them by both Mr. Pillersdorf and his wife Justice Stumbo.

6. There is no question in my mind but that Justice Stumbo was aware of my very active role in Rowe's campaign against her husband Mr. Pillersdorf.

7. In speaking with Mr. Emmons after the campaign, I was advised by Mr. Emmons that Mr. Pillersdorf had told him that it was his (Pillersdorf's) feeling that Rowe's presence in the race cost him (Pillersdorf) the election, because of the fact that Rowe's presence in the race split the vote in their home county of Floyd County.

8. Because of this, it would certainly have been my intention to have insisted that my attorneys move to recuse Justice Stumbo from participating in a vote on my case before the Supreme Court, had I had any idea that she would have been involved in the decision, when my case had been argued some ten months prior to Justice Stumbo's election to the Supreme Court.

Further Affiant sayeth naught.

/s/ John Kelly

STATE OF GEORGIA)
) SS
COUNTY OF FULTON)

Subscribed and sworn to before me by John Kelly this 16th day of March, 1994.

My Commission Expires: 7/28/95.

/s/ Beth Chessler
Notary Public